

**PennDOT Comments
on the
NEPA Task Force Findings/Recommendations**

Group 1 - Addressing Delays in the Process

Recommendation 1.1: Amend NEPA to define “major federal action.” NEPA would be enhanced to create a new definition of “major federal action” that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.

PennDOT Comments: PennDOT supports efforts to screen projects out of NEPA. We caution that defining one term (major federal action) that is difficult to quantify, with another term (substantial planning, time,...) that is also difficult to quantify, may not serve to clarify the issue. This new definition, as proposed, would not likely result in any beneficial changes for transportation projects. We recommend tying “major” to “significant” as discussed in 40 CFR 1508.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively.

PennDOT Comments: We do not feel that mandating the completion of an EIS within 18 to 24 months and an EA within 9 to 12 months is realistic, but rather suggest that it be a goal, with great efforts made to achieve that goal. We have serious concerns over the approach that “Analyses not concluded by these timeframes will be considered completed”. We question how one would proceed under this scenario if, for instance, the alternatives analysis were not completed by the end of the EIS 18-24 month time frame. We are required to complete an alternatives analysis under other environmental laws, such as Section 404, therefore this change to NEPA would not provide a benefit, as most of the requirements that take substantial time would still be necessary based on other laws such as Section 404, Section 106, the Endangered Species Act, etc. We feel that the proposed time restrictions for completing EAs and EISs would ultimately result in either rushed products with improper analyses, or projects that do not coordinate the NEPA process with other environmental laws, thereby resulting in the possibility of poor decisions and/or increased lawsuits.

It is our opinion that reducing the time to complete NEPA documents would best be achieved through better management and decision-making. Providing guidance on levels of study required and appropriate methodologies would also promote expediency. Another consideration in meeting timelines is the document review process, including technical reviews as well as reviews by Federal and State agencies and resource agencies. Other options to reduce

completion time could include agreeing on review timeframes up front and accounting for this in the project schedule, and/or allowing concurrent reviews, similar to language found in SAFETEA-LU Section 6002(g)(2). In addition, requiring education/training for individuals preparing and/or reviewing documents would serve to address this issue. Another option to reduce the length of documents and review times include the use of “Expert Systems”, such as the CE/EA Expert System created in Pennsylvania, which allows for electronic review and approval, consistent documentation, and smart-form technology to assist the preparer in identifying necessary information to be included in the document.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA’s and EIS’s. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process.

PennDOT Comments: The creation of “unambiguous” criteria would be very difficult. The defining point between a CE and an EIS is the significance of impacts, which can only be determined on a case-by-case basis depending upon context and intensity. It is possible that by defining the criteria too specifically, projects could be “pigeon-holed” into a particular level of documentation, thereby elevating some projects to an EIS that otherwise, based on context and intensity, may have qualified as a CE. Flexibility in the criteria is essential. We suggest that examples to help better define qualifications for a CE versus an EIS would be helpful. Rather than making an amendment to NEPA, the agencies should take advantage of the regulatory process to define which types of projects would qualify as a CE. For example, the criteria set forth in the Federal Highway Administration’s implementing regulations found at 23 CFR 771.117 are well written, and could serve as a good example for preparing this information.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).

PennDOT Comments: Since this is already discussed in 40 CFR 1502.9(c)(1)(i) and (ii), we do not feel that it is necessary to revise NEPA. The courts are already applying this standard, therefore we do not feel that this would provide any new benefits.

Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal action, the issues and

concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.

PennDOT Comments: PennDOT supports this recommendation, and notes that this should apply to all Federal laws, not just NEPA.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.

PennDOT Comments: The focus of this recommendation should not be on placing a restriction on the number of pages, but rather should focus on ensuring that documents are reader-friendly and concise, and that information presented is commensurate with the impacts and relevant to the decision (as discussed in 40 CFR 1502.2(a), (b), and (c), and as being studied by the joint AASHTO/ACEC/FHWA committee on improving the quality of NEPA documents). We suggest focusing on these topics, as well as the use of graphics and incorporation of detailed analyses by reference whenever possible to help limit the size of documents (40 CFR 1502.21). The use of page limitations will cause agencies to waste time and resources to meet the page limits instead of spending time ensuring that the content is appropriate and analytic rather than encyclopedic.

Group 3 – Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term “political subdivisions” to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.

PennDOT Comments: We do not support the provision for granting tribal, state, and local stakeholders cooperating agency status upon their request. Allowing all these stakeholders to have cooperating agency status would result in a cumbersome process, and cause unnecessary delays. We foresee delays in assessing whether an entity should be granted cooperating status, defending decisions to deny status, and additional delays due to the sheer number of individuals with differing opinions that would be required to reach consensus. In addition, this could lead to legal conflicts between local and state law in many circumstances. Cooperating agency status should continue to be tied to Federal and State agencies with jurisdictional authority or other special expertise at the lead agency’s discretion. Although we do not support granting cooperating status to all who request it, we do advocate that all stakeholders be engaged in the project development process early and often to keep them informed and gather important information and input so that issues can be resolved as early as possible.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.

PennDOT Comments: In Pennsylvania this would not be beneficial because we use one document to satisfy both Pennsylvania and NEPA requirements. Further, if the two processes are “functionally equivalent,” we do not see how this would reduce work efforts.

Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:

- Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.
- Clarify that parties must be involved throughout the process in order to have standing in an appeal.
- Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.
- Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger’s relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;
- Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;

PennDOT Comments: Overall, PennDOT agrees with the litigation issues expressed in Recommendation 4.1 indicating that parties taking legal action must have been involved throughout the project. Strictly defining standing would be of benefit. We also support the requirement that lawsuits be filed within 180 days of notice of final action. This is consistent with Section 6002(a) of SAFETEA-LU governing transportation projects.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

PennDOT Comments: PennDOT supports the recommendation for a clearinghouse for monitoring court decisions. However, we are unclear what the reference to requiring “that agencies pre clear projects” means. We do not feel that it would be beneficial to require agencies to have CEQ review and clear individual projects. Clarification on this recommendation is needed.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).

PennDOT Comments: While we support this concept in principle, the ability to meet Purpose and Need as well as impacts to the natural and cultural environment must also be considered as part of determining economical and technical feasibility. The terms “economically and technically feasible” should be defined. This recommendation should not result in a new requirement to do cost/benefit analyses, which would further bog down the process. PennDOT is already charged with ensuring the proper expenditure of taxpayers’ dollars.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. A provision would be created that require an extensive discussion of the “no action alternative” as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

PennDOT Comments: This recommendation is acceptable. PennDOT is already carrying out this recommendation for transportation projects. The No-Action Alternative is typically carried through the environmental consequences section of the EIS, and considers both positive and negative impacts associated with the No-Action Alternative. Analyzing the No-Action Alternative has been beneficial, in that it can serve as a baseline for impact comparison, and can even support the need to take action in some cases.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit.

PennDOT Comments: For PennDOT projects, mitigation commitments are summarized in the Record of Decision, and therefore PennDOT is legally bound to those commitments. The majority of these commitments stem from requirements of other environmental laws, such as Section 404, the Endangered Species Act, etc. NEPA currently is, and should remain a procedural statute. We strongly oppose mitigation becoming legally required under NEPA.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

PennDOT Comments: We agree with engaging stakeholders in the project development process. However, we suggest providing a definition for the term interested parties, similar to that included in SAFETEA-LU (“...Participation by interested parties... shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a reasonable opportunity to comment on...”). In addition, how often the consultation should occur, and what defines “formal sense” should be provided. Strict and formal consultation points with all “interested parties” could delay the process. Flexibility is important, and consultation requirements should be commensurate with project impacts. It will be necessary to ensure consistency between this recommendation and any actions taken in recommendations 2.1 and 3.1.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied “horizontally” to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws.

PennDOT Comments: This recommendation is acceptable to PennDOT. We do not see this resulting in a change to our current procedures; it would have neither a positive nor negative effect.

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.

PennDOT Comments: It is unclear how this provision would be consistent with or contradictory to the existing referral process contained at 40 CFR 1504. We do not see this as having a benefit, since the majority of conflicts arise from other substantive environmental laws, rather than from NEPA.

Recommendation 7.2: Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies.

PennDOT Comments: We agree that costs need to be controlled, and as a State agency we are already tasked with this. We do not feel that adding another level of bureaucracy will benefit this goal. We are concerned that implementation of a “cost ceiling” could result in certain necessary/worthwhile analyses being avoided to bypass/reduce costs. An example of useful cost cutting could include the provision for electronic distribution (CD-ROM) of NEPA documents to resource agencies and repositories that provide for public computer use.

Group 8 - Clarify meaning of “cumulative impacts”

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency’s assessment of existing environmental conditions will serve as the methodology to account for past actions.

PennDOT Comments: Agencies should have the flexibility to determine the methodology to assess cumulative impacts in accordance with the best interests of their agency. One size fits all is not appropriate for all federal agencies.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.”

PennDOT Comments: PennDOT has no comment on this recommendation. It appears as though this would simply “trade” definitions from “reasonably foreseeable” to “concrete proposed”. We do not see these as substantially different and see no benefit to this change.

Group 9 - Studies

Recommendation 9.1: CEQ study of NEPA’s interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:

- a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and
- b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

PennDOT Comments: PennDOT supports this recommendation. State-specific case studies should be included in this analysis.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.

PennDOT Comments: PennDOT supports this recommendation.

Recommendation 9.3: CEQ study of NEPA’s interaction with state “mini-NEPAs” and similar laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:

- a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA’s enactment interacts; and
- b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

PennDOT Comments: PennDOT supports this recommendation.